

**31A-40-101. Title.**

This chapter is known as the "Professional Employer Organization Licensing Act."

Enacted by Chapter 318, 2008 General Session

**31A-40-102. Definitions.**

As used in this chapter:

(1) (a) Except as provided in Subsection (1)(b), "administrative fee" means a fee charged to a client by a professional employer organization for a professional employer service.

(b) "Administrative fee" does not include an amount or a fee received by a professional employer organization that is:

- (i) compensation of a covered employee;
- (ii) a benefit for a covered employee;
- (iii) a payroll-related tax;
- (iv) an unemployment insurance contribution;
- (v) withholding of compensation for a covered employee;
- (vi) a workers' compensation premium; or
- (vii) another assessment paid by a professional employer organization to or on behalf of a covered employee under a professional employer agreement.

(2) "Assurance organization" means a person designated as an assurance organization in accordance with Section 31A-40-303.

(3) "Client" means a person who enters into a professional employer agreement with a professional employer organization.

(4) "Coemployer" means:

- (a) a client; or
- (b) a professional employer organization.

(5) "Coemployment relationship" means a relationship:

(a) that is intended to be ongoing rather than a temporary or project specific relationship; and

(b) wherein the rights and obligations of an employer that arise out of an employment relationship are allocated between coemployers pursuant to:

- (i) a professional employer agreement; or
- (ii) this chapter.

(6) Notwithstanding Section 31A-1-301, "controlling person" means a person who, individually or acting in concert with one or more persons, owns, directly or indirectly, 10% or more of the equity interest in a professional employer organization.

(7) "Covered employee" means an individual who has a coemployment relationship with a client and a professional employer organization if the conditions of Section 31A-40-203 are met.

(8) (a) "Employment related economic incentive" means:

(i) (A) a credit against or exemption from taxes due the state or a political subdivision of the state; or

(B) an economic inducement, including a loan or a grant; and

(ii) if the credit, exemption, or economic inducement described in Subsection

(8)(a)(i):

(A) is offered by the state or a political subdivision of the state; and

(B) has an eligibility requirement that relates in whole or in part to employment including:

(I) the number of employees; or

(II) the nature of the employment.

(9) "Guarantee" means to assume an obligation of another person if that person fails to meet the obligation.

(10) "Licensee" means a person licensed under this chapter.

(11) "Professional employer agreement" means a written contract by and between a client and a professional employer organization that provides for:

(a) the coemployment of a covered employee;

(b) with respect to a covered employee, the allocation of a right or obligation of an employer between:

(i) the client; and

(ii) the professional employer organization; and

(c) the assumption of the obligations imposed by this chapter by:

(i) the client; or

(ii) the professional employer organization.

(12) (a) Subject to Subsection (12)(b), "professional employer organization" means a person engaged in the business of providing a professional employer service.

(b) "Professional employer organization" does not include:

(i) a person that:

(A) does not:

(I) have as a principal business activity the entering into of a professional employer arrangement; or

(II) hold the person out as a professional employer organization; and

(B) shares an employee with a commonly owned company within the meaning of Sections 414(b) and (c), Internal Revenue Code;

(ii) an independent contractor arrangement by which a person:

(A) assumes responsibility for the product produced or service performed by the person or the person's agent; and

(B) retains and exercises primary direction and control over the work performed by an individual whose service is supplied under the independent contractor arrangement; or

(iii) a person providing temporary help service.

(13) "Professional employer organization group" means two or more professional employer organizations that are majority owned or commonly controlled or directed by the same one or more persons.

(14) "Professional employer service" means the service of entering into a coemployment relationship under this chapter under which all or a majority of the employees who provide a service to a client, or a division or work unit of a client, are covered employees.

(15) "Qualified actuary" means an individual who:

(a) is a member in good standing of a professional actuarial accreditation organization designated by the department by rule;

(b) is qualified to sign a statement of actuarial opinion or annual statement for a professional employer organization in accordance with the qualification standards for an actuary signing an opinion or annual statement as provided by the professional actuarial accreditation organization designated under Subsection (15)(a);

(c) is familiar with the valuation requirements applicable to a professional employer organization;

(d) has not been found by the commissioner, or if so found has subsequently been reinstated as a qualified actuary, following appropriate notice and hearing to have:

(i) violated a provision of, or an obligation imposed by, statute or other law in the course of the actuary's dealings as a qualified actuary;

(ii) been found guilty of a fraudulent or dishonest practice;

(iii) demonstrated the actuary's incompetency, lack of cooperation, or untrustworthiness to act as a qualified actuary;

(iv) submitted to the commissioner during the past five years, pursuant to this rule, an actuarial opinion or memorandum that the commissioner rejected because it did not meet the provisions of rule; or

(v) resigned or been removed as an actuary within the past five years as a result of an act or omission indicated in an adverse report on examination or as a result of failure to adhere to a generally acceptable actuarial standard; and

(e) has not failed to notify the commissioner of an action taken by any commissioner of another state similar to that under Subsection (15)(d).

(16) "Temporary help service" means a service consisting of a person:

(a) recruiting and hiring the person's own employee;

(b) finding another person that wants the services of that employee;

(c) assigning the employee to:

(i) perform services at or for the other person to support or supplement the other person's employees;

(ii) provide assistance in a special work situation such as:

(A) an employee absence;

(B) a skill shortage; or

(C) a seasonal workload; or

(iii) perform a special assignment or project; and

(d) customarily reassigning the employee to another organization when the employee finishes an assignment.

(17) "Working capital" means the current assets minus the current liabilities of a professional employer organization determined in accordance with generally accepted accounting principles.

Enacted by Chapter 318, 2008 General Session

**31A-40-103. Duties of the commissioner.**

(1) (a) The commissioner shall maintain a list of professional employer organizations that are licensed under this chapter.

(b) The commissioner shall make the list required by this Subsection (1) available to the public by electronic or other means.

(2) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking

Act, the commissioner:

(a) shall make rules to prescribe the requirements for forms required under this chapter;

(b) may make rules to prescribe the requirements and process for correcting under Section 31A-40-205:

(i) a deficiency in working capital; or

(ii) negative working capital;

(c) may make rules to prescribe the requirements for the review and submission of a financial statement under Section 31A-40-305:

(i) that are consistent with generally accepted accounting principles; and

(ii) including the timeliness of a financial statement; and

(d) may make rules to prescribe the requirements and process for when a professional employer organization license is terminated by:

(i) voluntary surrender of the professional organization license; or

(ii) involuntary surrender of the professional organization license.

(3) A rule in effect on May 5, 2008 under the repealed Title 58, Chapter 59, Professional Employer Organization Registration Act, remains in effect until such time as the commissioner modifies or repeals the rule.

Amended by Chapter 10, 2010 General Session

**31A-40-104. Confidentiality -- Cooperation with other agencies.**

(1) Notwithstanding Title 63G, Chapter 2, Government Records Access and Management Act, and except as provided in Subsection (2), (3), or (4), the commissioner or department may not disclose information obtained from a professional employer organization under this chapter.

(2) The commissioner or department may disclose information on an aggregate basis that does not identify an individual professional employer organization or client.

(3) The commissioner or department may disclose information obtained from a professional employer organization under this chapter to a government entity if the government entity requires the information to perform the government entity's duties.

(4) (a) The commissioner shall coordinate the commissioner's administration of this chapter and share information with:

(i) the Department of Workforce Services;

(ii) the Labor Commission; and

(iii) the State Tax Commission.

(b) An agency listed in Subsection (4)(a) shall treat the information obtained under this section as confidential unless disclosure of the information is required in accordance with:

(i) this title; or

(ii) Title 63G, Chapter 2, Government Records Access and Management Act.

Enacted by Chapter 318, 2008 General Session

**31A-40-201. Enforceable rights and obligations.**

(1) In a coemployment relationship under a professional employer agreement:

- (a) a professional employer organization:
  - (i) may only enforce a right of an employer that is specifically allocated to the professional employer organization under the professional employer agreement or this chapter; and
  - (ii) is subject only to an obligation of an employer specifically allocated to the professional employer organization by the professional employer agreement or this chapter; and
- (b) a client:
  - (i) may enforce a right of an employer:
    - (A) allocated to the client in the professional employer agreement or this chapter; or
    - (B) not specifically allocated to the professional employer organization under the professional employer agreement or this chapter; and
  - (ii) is subject to an obligation of an employer:
    - (A) allocated to the client by the professional employer agreement or this chapter; or
    - (B) not specifically allocated to a professional employer organization by the professional employer agreement or this chapter.
- (2) A right or obligation of a professional employer organization as a coemployer of a covered employee is limited to a right or obligation arising pursuant to the professional employer agreement and this chapter during the term of coemployment of the covered employee by the professional employer organization.

Enacted by Chapter 318, 2008 General Session

**31A-40-202. Professional employer agreement -- Specific responsibilities.**

- (1) Except as specifically provided in this chapter, a coemployment relationship between a client and a professional employer organization, and between each coemployer and a covered employee, is governed by a professional employer agreement.
- (2) (a) As used in this Subsection (2), unless a professional employer organization expressly agrees to assume liability for the payment in a professional employer agreement, the term "compensation to a covered employee" does not include an obligation between a client and a covered employee for a payment beyond or in addition to the covered employee's salary, draw, or regular rate of pay, such as:
  - (i) a bonus;
  - (ii) a commission;
  - (iii) severance pay;
  - (iv) deferred compensation;
  - (v) profit sharing; or
  - (vi) pay for vacation, sick, or other paid time off.
- (b) A professional employer agreement shall include the following:
  - (i) the allocation of a right or obligation consistent with Section 31A-40-201;
  - (ii) a requirement that the professional employer organization shall:
    - (A) pay compensation to a covered employee; and
    - (B) withhold, collect, report, and remit one or more of the following:

- (I) a payroll-related tax; and
- (II) an unemployment insurance contribution; and
- (C) to the extent that the professional employer organization assumes responsibility in the professional employer agreement, make payments for an employee benefit of a covered employee;

- (iii) that the professional employer organization has a right to hire, discipline, or terminate a covered employee to the extent necessary to fulfill the professional employer organization's obligations under the professional employer agreement and this chapter;

- (iv) that the client has a right to hire, discipline, and terminate a covered employee; and

- (v) the responsibility of the client or professional employer organization related to obtaining workers' compensation coverage for a covered employee in a manner consistent with Section 31A-40-209.

(3) A professional employer organization shall provide written notice to a covered employee of the general nature of the coemployment relationship between and among the professional employer organization, the client, and the covered employee.

(4) (a) Except to the extent otherwise expressly provided by the professional employer agreement:

- (i) a client is solely responsible for the quality, adequacy, or safety of a good or service produced or sold in the client's business;

- (ii) a client is solely responsible for directing, supervising, training, and controlling the work of a covered employee with respect to:

- (A) a business activity of the client;

- (B) the discharge of a fiduciary responsibility of the client; or

- (C) compliance with a licensure, registration, or certification requirement applicable to the client or to the covered employee;

- (iii) a client is solely responsible for an act, error, or omission of a covered employee with regard to a circumstance described in Subsection (4)(a)(ii);

- (iv) a client is not liable for an act, error, or omission of:

- (A) a professional employer organization; or

- (B) a covered employee, if the covered employee is acting under the express direction and control of the professional employer organization; and

- (v) a professional employer organization is not liable for an act, error, or omission of:

- (A) a client; or

- (B) a covered employee, if the covered employee is acting under the express direction and control of the client.

- (b) This Subsection (4) may not be interpreted to limit a contractual liability or obligation specifically provided in a professional employer agreement.

- (c) (i) Unless the conditions of Subsection (4)(c)(ii) are met, a covered employee is not, solely as the result of being a covered employee of a professional employer organization, an employee of the professional employer organization for purposes of one or more of the following carried by the professional employer organization:

- (A) general liability insurance;

- (B) a fidelity bond;

- (C) a surety bond;
- (D) an employer liability that is not covered by workers' compensation; or
- (E) liquor liability insurance.
- (ii) A covered employee is considered an employee of the professional employer organization for a purpose described in Subsection (4)(c)(i) if the covered employee is included by specific reference for that purpose in:
  - (A) the professional employer agreement; and
  - (B) a prearranged employment contract, insurance contract, or bond.

Enacted by Chapter 318, 2008 General Session

**31A-40-203. Covered employee.**

(1) (a) An individual is a covered employee of a professional employer organization if the individual is coemployed pursuant to a professional employer agreement subject to this chapter.

(b) An individual who is a covered employee under a professional employer agreement is a covered employee, whether or not the professional employer organization provides the notice required by Subsection 31A-40-202(3), the earlier of the day on which:

(i) the employee is first compensated by the professional employer organization; or

(ii) the client notifies the professional employer organization of a new hire.

(2) An individual who is an officer, director, shareholder, partner, or manager of a client is a covered employee:

(a) to the extent that the client and the professional employer organization expressly agree in the professional employer agreement that the individual is a covered employee;

(b) if the conditions of Subsection (1) are met; and

(c) if the individual acts as an operational manager or performs day-to-day an operational service for the client.

Amended by Chapter 290, 2014 General Session

Amended by Chapter 300, 2014 General Session

**31A-40-204. Rights and obligations unaffected -- Licensed, registered, or certified occupations or professions.**

(1) This chapter does not and a professional employer agreement may not affect, modify, or amend a:

(a) collective bargaining agreement; or

(b) right or obligation of a client, professional employer organization, or covered employee under:

(i) the federal National Labor Relations Act, 29 U.S.C. Sec. 151 et seq.;

(ii) the federal Railway Labor Act, 45 U.S.C. Sec. 151 et seq.; or

(iii) a state law similar to a federal law described in this Subsection (1)(b).

(2) (a) A professional employer agreement may not:

(i) diminish, abolish, or remove a right of a covered employee to a client or an

obligation of the client to a covered employee that exists on or before the day on which the professional employer agreement takes effect;

(ii) affect, modify, or amend a contractual relationship or restrictive covenant between a covered employee and a client in effect on the day on which the professional employer agreement takes effect; or

(iii) prohibit or amend a contractual relationship or restrictive covenant that is entered into between a covered employee and a client after the day on which the professional employer agreement takes effect.

(b) A professional employer organization is not responsible or liable in connection with, or arising out of, a contractual relationship or restrictive covenant described in Subsection (2)(a) unless the professional employer organization specifically agrees to be responsible in writing.

(3) This chapter does not and a professional employer agreement may not create an enforceable right of a covered employee against a professional employer organization that is not specifically provided by the professional employer agreement or this chapter.

(4) (a) Except as provided in this Subsection (4), this chapter does not and a professional employer agreement may not affect, modify, or amend a state, local, or federal license, registration, or certification requirement applicable to a client or a covered employee.

(b) If a covered employee is required by federal or state law to be licensed, registered, or certified, the covered employee is considered to be solely an employee of the client for purposes of the license, registration, or certification requirement.

(c) A professional employer organization is not considered to engage in an activity that is subject to licensing, registration, or certification by a local, state, or federal government or is regulated by a local, state, or federal government solely by entering into or maintaining a coemployment relationship with a covered employee who is:

(i) subject to licensing, registration, or certification; or

(ii) regulated by the local, state, or federal government.

(d) A client has the sole right to direct or control a professional, licensed, registered, or certified activity of:

(i) a covered employee; and

(ii) the client's business.

(e) Notwithstanding this chapter, a covered employee and client remain subject to regulation by the local, state, or federal government responsible for licensing, registration, or certification of the covered employee or client.

Enacted by Chapter 318, 2008 General Session

### **31A-40-205. Financial capability.**

(1) Except as provided in Subsection (2) or (4), as of the day a person applies for licensure or renewal of a license and at all times while licensed, a professional employer organization or collectively a professional employer organization group shall:

(a) have at least \$100,000 in working capital as determined by generally accepted accounting principles; or



(b) provide to the commissioner one of the following in an amount equal to or greater than an amount calculated by subtracting the amount of working capital of the professional employer organization or professional employer organization group from \$100,000:

- (i) a bond;
- (ii) an irrevocable letter of credit;
- (iii) one or more credits or securities as determined by the market value of the credits or securities; or
- (iv) a combination of Subsections (1)(b)(i) through (iii).

(2) (a) Except as provided in Subsection (2)(c), the license of a professional employer organization or professional employer organization group terminates 180 days from the day on which the commissioner finds that the professional employer organization has less than \$100,000 in working capital, unless the professional employer organization or professional employer organization group eliminates the deficiency within 180 days of the day on which the commissioner makes the finding.

(b) During the 180-day period described in Subsection (2)(a), the professional employer organization or professional employer organization group shall submit quarterly to the commissioner:

- (i) a quarterly financial statement; and
- (ii) an attestation that:
  - (A) is signed by:
    - (I) the chief executive officer or a controlling person of the professional employer organization; or
    - (II) for a professional employer organization group, the chief executive officer or chief financial officer of each member of the professional employer organization group; and
  - (B) states that all of the following are paid for a covered employee when due by the professional employer organization or each member of the professional employer organization group:
    - (I) compensation;
    - (II) a benefit;
    - (III) a payroll-related tax;
    - (IV) an unemployment insurance contribution;
    - (V) withholding of compensation for a covered employee;
    - (VI) workers' compensation premium; or
    - (VII) another assessment paid by a professional employer organization to or on behalf of a covered employee under a professional employer agreement.

(c) The license of a professional employer organization or professional employer organization group terminates on the day on which the commissioner finds that the professional employer organization:

- (i) has negative working capital; and
  - (ii) (A) is incapable of continued operations; or
  - (B) poses an immediate threat to the public welfare.
- (3) A bond, letter of credit, or security described in Subsection (1) shall:
- (a) be held as designated by the commissioner; and
  - (b) secure payment by the professional employer organization or the

professional employer organization group of the following payments or other entitlements due to or with respect to a covered employee, if the professional employer organization or each member of the professional employer organization group does not make a payment when due:

- (i) compensation of a covered employee;
- (ii) a benefit for a covered employee;
- (iii) payroll-related taxes;
- (iv) unemployment insurance contributions; and
- (v) workers' compensation premiums.

(4) A professional employer organization is exempt from this section if the professional employer organization is licensed:

- (a) through an assurance organization in accordance with Section 31A-40-303; or
- (b) under this chapter with a small operation license in accordance with Section 31A-40-304.

Enacted by Chapter 318, 2008 General Session

**31A-40-206. Professional employer service not insurance.**

(1) A professional employer organization licensed under this chapter is not considered engaged in the sale of insurance or as acting as a third party administrator when the professional employer organization engages in one or more of the following with respect to a professional employer service:

- (a) offering;
- (b) marketing;
- (c) selling;
- (d) administering; or
- (e) providing.

(2) Subsection (1) applies to a professional employer service that includes an employee benefit plan for a covered employee.

Enacted by Chapter 318, 2008 General Session

**31A-40-207. Taxation.**

(1) (a) A covered employee whose service is subject to a sales or use tax under Title 59, Chapter 12, Sales and Use Tax Act, is considered the employee of the client for purposes of imposing and collecting the sales or use tax on the service performed by the covered employee.

(b) This chapter may not be interpreted to relieve a client of a sales or use tax liability with respect to a good or service of the client.

(2) (a) If the amount of a tax or fee described in Subsection (2)(b) is determined on the basis of the gross receipts of a professional employer organization, only an administrative fee collected by the professional employer organization is considered gross receipts.

(b) This Subsection (2) applies to:

- (i) a tax on a professional employer service;
  - (ii) a business license fee; or
  - (iii) another fee or charge.
- (3) A taxing entity shall assess a tax assessed on a per capita or per employee basis:
- (a) on a client for a covered employee; and
  - (b) on the professional employer organization for an employee of the professional employer organization who is not a covered employee coemployed with a client.
- (4) If a tax is imposed or calculated on the basis of total payroll, the professional employer organization is eligible to apply a small business allowance or exemption available to the client for a covered employee for the purpose of computing the tax.

Enacted by Chapter 318, 2008 General Session

**31A-40-208. Benefit plan.**

- (1) A client and a professional employer organization licensed under this chapter shall each be considered an employer for purposes of sponsoring a retirement or welfare benefit plan for a covered employee.
- (2) A fully insured welfare benefit plan offered to a covered employee of a single professional employer organization licensed under this chapter:
- (a) is to be treated as a single employer welfare benefit plan for purposes of this title and rules made under this title;
  - (b) may not be considered an employer welfare fund or plan, as described in Section 31A-13-101; and
  - (c) the single professional employer organization that sponsors the fully insured welfare plan is exempt from the registration requirements under this title for:
    - (i) an insurance provider; or
    - (ii) an employer welfare fund or plan.
- (3) For purposes of Chapter 30, Individual, Small Employer, and Group Health Insurance Act:
- (a) a professional employer organization licensed under this chapter is considered the employer of a covered employee; and
  - (b) all covered employees of one or more clients participating in a health benefit plan sponsored by a single professional employer organization licensed under this chapter are considered employees of that professional employer organization.
- (4) A professional employer organization licensed under this chapter may offer to a covered employee a health benefit plan that is not fully insured by an authorized insurer, only if:
- (a) the professional employer organization has operated as a professional employer organization for at least one year before the day on which the professional employer organization offers the health benefit plan; and
  - (b) the health benefit plan:
    - (i) is administered by a third-party administrator licensed to do business in this state;
    - (ii) holds all assets of the health benefit plan, including participant contributions,

in a trust account;

(iii) has and maintains reserves that are sound for the health benefit plan as determined by an actuary who:

(A) uses generally accepted actuarial standards of practice; and

(B) is an independent qualified actuary, including not being an employee or covered employee of the professional employer organization;

(iv) provides written notice to a covered employee participating in the health benefit plan that the health benefit plan is self-insured or is not fully insured;

(v) consents to an audit:

(A) on a random basis; or

(B) upon a finding of a reasonable need by the commissioner; and

(vi) provides for continuation of coverage in compliance with Section 31A-22-722.

(5) The cost of an audit described in Subsection (4)(b)(v) shall be paid by the sponsoring professional employer organization.

(6) A plan of a professional employer organization described in Subsection (4) that is not fully insured:

(a) is subject to the requirements of this section; and

(b) is not subject to another licensure or approval requirement of this title.

Amended by Chapter 169, 2012 General Session

**31A-40-209. Workers' compensation.**

(1) In accordance with Section 34A-2-103, a client is responsible for securing workers' compensation coverage for a covered employee.

(2) Subject to the requirements of Section 34A-2-103, if a professional employer organization obtains or assists a client in obtaining workers' compensation insurance pursuant to a professional employer agreement:

(a) the professional employer organization shall ensure that the client maintains and provides workers' compensation coverage for a covered employee in accordance with Subsection 34A-2-201(1) or (2) and rules of the Labor Commission, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;

(b) the workers' compensation coverage may show the professional employer organization as the named insured through a master policy, if:

(i) the client is shown as an insured by means of an endorsement for each individual client;

(ii) the experience modification of a client is used; and

(iii) the insurer files the endorsement with the Division of Industrial Accidents as directed by a rule of the Labor Commission, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;

(c) at the termination of the professional employer agreement, if requested by the client, the insurer shall provide the client records regarding the loss experience related to workers' compensation insurance provided to a covered employee pursuant to the professional employer agreement; and

(d) the insurer shall notify a client if the workers' compensation coverage for the client is terminated.

(3) In accordance with Section 34A-2-105, the exclusive remedy provisions of Section 34A-2-105 apply to both the client and the professional employer organization under a professional employer agreement regulated under this chapter.

(4) Notwithstanding the other provisions in this section, an insurer may choose whether to issue:

- (a) a policy for a client; or
- (b) a master policy with the client shown as an additional insured by means of an individual endorsement.

Amended by Chapter 290, 2014 General Session

Amended by Chapter 300, 2014 General Session

**31A-40-210. Unemployment compensation insurance.**

(1) For purposes of Title 35A, Chapter 4, Employment Security Act, a covered employee of a professional employer organization licensed under this chapter is considered the employee of the professional employer organization.

(2) The professional employer organization described in Subsection (1) shall pay a contribution, penalty, or interest required under Title 35A, Chapter 4, Employment Security Act, on wages, as defined in Section 35A-4-208, paid by the professional employer organization to the covered employee during the term of the professional employer agreement.

(3) A professional employer organization shall report and pay a required contribution to the unemployment compensation fund when due using the state employer account number and the contribution rate of the professional employer organization.

(4) Unless a client is otherwise eligible for an experience rating, the Unemployment Insurance Division of the Department of Workforce Services shall treat a client as a new employer without a previous experience record beginning on the day on which:

- (a) a professional employer agreement between the client and a professional employer organization terminates; or
- (b) the professional employer organization fails to submit a report or make a tax payment when due as required by this chapter.

Enacted by Chapter 318, 2008 General Session

**31A-40-211. Employment related economic incentives -- Employment information -- Client's status.**

(1) Notwithstanding the other provisions of this chapter, for purposes of determining eligibility for an employment related economic incentive, a covered employee is considered only an employee of the client.

(2) (a) If eligibility for an employment related economic incentive relates to a covered employee, the client is entitled to the employment related economic incentive if the client is otherwise eligible for the employment related economic incentive.

(b) A professional employer organization is not eligible for an employment related economic incentive described in Subsection (2)(a).

(3) If eligibility for or the amount of an employment related economic incentive is determined on the basis of the number of employees, a client is treated as employing only:

(a) a covered employee coemployed by the client under the professional employer agreement; or

(b) an employee solely employed by the client.

(4) Subject to a confidentiality provision in federal or state law, a professional employer organization shall provide employment information:

(a) upon the request of:

(i) the client; or

(ii) the governmental entity administering an employment related economic incentive; and

(b) reasonably required for:

(i) administration of an employment related economic incentive; or

(ii) necessary to support any of the following by a client seeking an employment related economic incentive:

(A) a request;

(B) a claim;

(C) an application; or

(D) another action.

(5) With respect to a bid, contract, purchase order, or agreement entered into with the state or a political subdivision of the state, the fact that the client enters into a professional employer agreement does not affect the client's status or certification as a:

(a) small business;

(b) minority-owned business;

(c) disadvantaged business;

(d) woman-owned business; or

(e) historically underutilized business.

Enacted by Chapter 318, 2008 General Session

**31A-40-301. Licensing required.**

(1) Except as otherwise provided in this chapter, a person may not engage in the following before the day on which the person is licensed under this chapter:

(a) providing a professional employer service in this state;

(b) advertising that the person provides a professional employer service in this state; or

(c) holding itself out as providing a professional employer service in this state.

(2) A person described in Subsection (1) is subject to this chapter regardless of whether the person uses one of the following terms with or without the term "registered" or "licensed":

(a) "administrative employer";

(b) "employee leasing company";

(c) "professional employer organization";

(d) "PEO";

(e) "staff leasing company"; or

(f) another name.

Enacted by Chapter 318, 2008 General Session

**31A-40-302. Licensing process.**

- (1) To apply for an initial or renewal license under this chapter, a person shall:
- (a) (i) submit an application with the commissioner on a form and in a manner the commissioner shall determine by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; and
  - (ii) pay a license fee determined in accordance with Section 31A-3-103 that is not refunded if the application:
    - (A) is denied;
    - (B) does not comply with Section 31A-40-303; or
    - (C) if incomplete, is never completed by the person filing the application; or
  - (b) comply with Section 31A-40-303.
- (2) In the application described in Subsection (1)(a), the person shall provide:
- (a) any name under which the professional employer organization will engage in a professional employer service;
  - (b) the address of the principal place of business of the professional employer organization;
  - (c) the address of each location the professional employer organization maintains in this state;
  - (d) the professional employer organization's federal taxpayer or employer identification number;
  - (e) the following information by jurisdiction of each name under which the professional employer organization operated in the five years preceding the day on which the person submits the application:
    - (i) the name;
    - (ii) an alternative name, if any;
    - (iii) a name of a predecessor; and
    - (iv) if known, a successor business entity;
  - (f) a statement of ownership that includes the name and evidence of the business experience of a person that, individually or acting in concert with one or more other persons, owns or controls, directly or indirectly, 10% or more of the equity interests of the professional employer organization;
  - (g) a statement of management that includes the name and evidence of the business experience of an individual who:
    - (i) serves as president of the professional employer organization;
    - (ii) serves as chief executive officer of the professional employer organization; or
    - (iii) may act as a senior executive officer of the professional employer organization; and
  - (h) a financial statement that:
    - (i) sets forth the financial condition of:
      - (A) the professional employer organization; or
      - (B) a professional employer organization group in which the professional employer organization is a member;

- (ii) states whether or not the professional employer organization complies with Section 31A-40-205; and
- (iii) complies with Section 31A-40-305.
- (3) A professional employer organization shall renew its license by no later than October 1 of each year.

Amended by Chapter 10, 2010 General Session

**31A-40-303. Licensed through an assurance organization.**

- (1) (a) A person may comply with Section 31A-40-302 by:
  - (i) filing with the commissioner:
    - (A) a certification that an assurance organization certifies the qualifications of the professional employer organization;
    - (B) the information required by Subsections 31A-40-302(2)(a) through (d) and 31A-40-302(2)(h); and
    - (C) any changes to the information required by Subsection (1)(a)(i)(B) within 30 days of the day on which the information changes; and
  - (ii) paying a license fee determined in accordance with Section 31A-3-103.
- (b) A professional employer organization that meets the requirements of Section 31A-40-302 by complying with this section is not required to:
  - (i) renew its license until the day on which the assurance organization no longer certifies the qualifications of the professional employer organization;
  - (ii) provide the information in Subsections 31A-40-302(2)(e) through (g); or
  - (iii) comply with Section 31A-40-205.
- (c) If a professional employer organization that meets the requirements of Section 31A-40-302 by complying with this section receives a new or renewed certification by the assurance organization, the professional employer organization shall file with the commissioner a new certification within 30 days from the day on which the professional employer organization receives the new or renewed certification from the assurance organization.
- (d) (i) If a professional employer organization authorizes an assurance organization to act on behalf of the professional employer organization for purposes of licensure under this section, the commissioner shall accept the assurance organization's filing of the information required by Subsection (1)(a) or (1)(c) if the information otherwise complies with this section and commission rules.
  - (ii) Notwithstanding Subsection (1)(d)(i), if the assurance organization fails to make a required filing under this section, the commissioner may not accept, not renew, or terminate the professional employer organization's license.
- (2) The commissioner shall designate one or more assurance organizations by rule:
  - (a) consistent with this section;
  - (b) made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; and
  - (c) that requires that an assurance organization designated by the commissioner be licensed by one or more states other than Utah to certify the qualifications of a professional employer organization.



(3) The qualifications certified by an assurance organization designated by the commissioner shall include at a minimum that a professional employer organization:

(a) ensure that each controlling person of the professional employer organization:

(i) be competent to manage a professional employer organization;

(ii) be responsible in the controlling person's finances; and

(iii) not have a history of or be engaged in unlawful activities;

(b) has a history that is verifiable that the professional employer organization:

(i) complies with regulatory requirements; and

(ii) engages in financially responsible conduct;

(c) has or is able to obtain audited financial statements;

(d) has an adjusted net worth equal to or in excess of the greater of:

(i) \$100,000; or

(ii) 5% of total adjusted liabilities;

(e) has liquid assets that are sufficient to pay short-term liabilities as demonstrated by a ratio determined by dividing current assets by current liabilities or a similar formula;

(f) has on its books adequate financial reserves for all local, state, and federal self-insurance and any insurance policy or plan in which the final cost of coverage is affected by claim losses;

(g) operates in conformity with all applicable laws and regulations including those laws and regulations in addition to this chapter;

(h) does not engage in deceptive trade practices or misrepresentations of an employer's obligation or liability;

(i) has a written professional employer agreement with each client;

(j) has or is willing to obtain a written acknowledgment, as part of an existing form or separately, from each covered employee stating that the covered employee understands and accepts the nature, terms, and conditions of the coemployment relationship;

(k) establishes and maintains a coemployment relationship by assuming key employer attributes with respect to covered employees as demonstrated by the professional employer agreement and employment forms, policies, and procedures;

(l) provides all covered employees with a written copy of the professional employer organization's employment policies and procedures;

(m) ensures that all covered employees are covered in a regulatory compliant manner by workers' compensation insurance;

(n) does not knowingly use the coemployment relationship to assist a client to evade or avoid the client's obligations under:

(i) the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq.;

(ii) the federal Railway Labor Act, 45 U.S.C. Sec. 151 et seq.; or

(iii) any collective bargaining agreement;

(o) except through a licensed insurance agent, does not:

(i) represent or imply that it can sell insurance;

(ii) attempt to sell insurance; or

(iii) sell insurance;

(p) markets and provides, or is willing to market and provide professional

employer service under a separate and distinct trade name from any affiliated professional employer organization that is not certified by the assurance organization;

(q) does not allow any person not certified by the assurance organization to use the professional employer organization's trade name in the sale or delivery of the professional employer organization's professional employer service;

(r) does not guarantee, participate in, transfer between, or otherwise share liabilities with any other professional employer organization that is not certified by the assurance organization:

(i) in the employment of covered employees; or

(ii) in any employee benefit or insurance policy or plan that is not fully insured and fully funded; and

(s) has the ability to provide a regulatory agency or insurance carrier upon request with:

(i) a client's name, address, and federal tax identification number;

(ii) payroll data by:

(A) client;

(B) (I) client SIC Code of the 1987 Standard Industrial Classification Manual of the federal Executive Office of the President, Office of Management and Budget; or

(II) client classification under the 2002 North American Industry Classification System of the federal Executive Office of the President, Office of Management and Budget; and

(C) workers' compensation classification;

(iii) the names of covered employees by:

(A) the worksite of a client; and

(B) workers' compensation classification; and

(iv) workers' compensation certificates of insurance.

(4) This section does not modify the commissioner's authority or responsibility to accept, renew, or terminate a license.

Amended by Chapter 340, 2011 General Session

### **31A-40-304. Small operation license.**

(1) A professional employer organization may obtain a small operation license under this chapter if the professional employer organization:

(a) files an application for a small operation license with the commissioner:

(i) on a form and in a manner the commissioner shall determine by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; and

(ii) that includes the information and documentation the commissioner determines is necessary to show that the professional employer organization qualifies for a small operation license;

(b) pays a small operation license fee determined in accordance with Section 31A-3-103, that is not refunded if the application:

(i) is denied; or

(ii) if incomplete, is never completed by the person filing the application;

(c) is domiciled outside of this state;

(d) is licensed or registered as a professional employer organization in another

state;

- (e) does not maintain an office in this state or directly solicit a client that:
    - (i) is domiciled in this state; or
    - (ii) maintains a location within this state;
  - (f) does not have at any time more than 50 covered employees employed or domiciled in this state; and
  - (g) is not owned or directed by another professional employer organization operating in the state.
- (2) (a) A small operation license is valid for one year.
- (b) A professional employer organization may annually renew a small operation license.
- (3) A professional employer organization with a small operation license under this chapter is not subject to Section 31A-40-205.

Enacted by Chapter 318, 2008 General Session

**31A-40-305. Financial statements required for licensing.**

- (1) (a) A person that files a financial statement with an application for an initial license under Section 31A-40-302 shall file the professional employer organization's most recent audit as of the day the application is filed, except that the financial statement may not be older than 10 months from the day on which the application is filed.
- (b) A person that files a financial statement to renew a license shall file the most recent financial statement of the professional employer organization as of the day the application for renewal is filed with the commission.
- (c) (i) The person filing an application may apply for an extension with the commissioner if the request for an extension is accompanied by a letter from the person conducting the audit for the financial statement stating:
- (A) the reason for the delay; and
  - (B) the anticipated date on which the audit will be completed.
- (ii) If a person complies with Subsection (1)(c)(i), the commissioner may grant an extension up to 30 days from the day on which the financial statement is due under this section.
- (d) A professional employer organization may file a combined or consolidated financial statement if:
- (i) the professional employer organization is owned by or in common control with another person; and
  - (ii) the combined or consolidated financial statement clearly identifies the following of the professional employer organization:
    - (A) its working capital;
    - (B) its assets; and
    - (C) its liabilities.
- (2) A financial statement required by this chapter shall be:
- (a) prepared in accordance with generally accepted accounting principles;
  - (b) audited by an independent certified public accountant licensed to practice in the jurisdiction in which the person conducting the audit is located; and

(c) without qualification as to the going concern status of the professional employer organization.

(3) Notwithstanding the other provisions of this section, the commissioner shall license a professional employer organization that does not have sufficient operating history to have an audited financial statement on the basis of at least 12 months if:

(a) the professional employer organization complies with the other requirements for licensure, including Section 31A-40-205; and

(b) the person filing the application for license files a financial statement that is reviewed by a certified public accountant.

Enacted by Chapter 318, 2008 General Session

**31A-40-306. Professional employer organization group.**

(1) Subject to Subsection (2), a professional employer organization that is a member of a professional employer organization group may comply with Section 31A-40-205 or Sections 31A-40-302 through 31A-40-305 on a combined or consolidated basis if each member of the professional employer organization group guarantees the obligations under this chapter of each other member of the professional employer organization group.

(2) The controlling entity of a professional employer organization group shall guarantee the obligations of a professional employer organization under this chapter if the professional employer organization group files a combined or consolidated audited financial statement that includes a person that is not:

(a) a professional employer organization; or

(b) a member of the professional employer organization group.

Enacted by Chapter 318, 2008 General Session

**31A-40-307. Voluntary surrender of professional employer organization license.**

(1) When a professional employer organization wants to voluntarily surrender its professional employer organization license, the professional employer organization shall:

(a) notify in writing each coemployer regarding the impending loss of the following provided under the professional employer agreement:

(i) workers' compensation insurance coverage;

(ii) health care benefits, if a coemployers' employee welfare plan includes fully insured or partially insured health insurance benefits; and

(iii) any other insurance benefit provided to coemployers by the professional employer organization; and

(b) submit a letter of intent to voluntarily surrender the license to the commissioner:

(i) after providing the notice to coemployers under Subsection (1)(a); and

(ii) not less than 45 days before the day on which the professional employer organization surrenders its professional employer organization license.

(2) The letter of intent to voluntarily surrender a professional employer

organization license shall include the following:

- (a) the reason the professional employer organization license is being surrendered;
- (b) a discussion of each process or plan to handle the obligations to coemployers and employees;
- (c) a list of coemployers as of the date of the letter;
- (d) a copy of the notice sent to the coemployers under Subsection (1)(a);
- (e) certification that the professional employer organization has notified the coemployers located in Utah of the professional employer organization's intent to cease doing business in Utah; and
- (f) the signature of the professional employer organization's chief executive officer or controlling individual.

Enacted by Chapter 10, 2010 General Session

**31A-40-308. Material changes.**

A professional employer organization shall notify the commissioner within 30 days of a change in:

- (1) ownership;
- (2) an address or telephone number;
- (3) a contact person; or
- (4) business email address at which the commissioner may contact the professional employer organization.

Enacted by Chapter 284, 2011 General Session

**31A-40-309. Applicability of other provisions of law.**

A professional employer organization is subject to Sections 31A-23a-402 and 31A-23a-402.5.

Enacted by Chapter 169, 2012 General Session

**31A-40-401. Prohibited acts.**

- (1) A person may not:
  - (a) offer or provide a professional employer service if the person is not licensed under this chapter;
  - (b) use one of the following names if the person is not licensed under this chapter:
    - (i) "administrative employer";
    - (ii) "employee leasing";
    - (iii) "PEO";
    - (iv) "professional employer organization";
    - (v) "staff leasing"; or
    - (vi) other name that represents the provision of a professional employer service;
  - (c) knowingly provide false or fraudulent information to the commissioner:
    - (i) in conjunction with an application to be licensed or to renew a license under

this chapter; or

(ii) in a report required under this chapter;

(d) knowingly make a material misrepresentation to the commissioner or other governmental agency;

(e) fail to make a filing with a state agency that is required by this chapter or the professional employer agreement within 30 days of the day on which the filing is due;

(f) fail to make a payment to a state agency that is required by this chapter or the professional employer agreement within 30 days of the day on which the payment is due;

(g) (i) offer a covered employee a self-funded medical plan unless the self-funded medical plan is maintained for the sole benefit of covered employees;

(ii) misrepresent that a self-funded medical plan it offers is other than self-funded; or

(iii) offer to a covered employee a self-funded or partially self-funded medical plan without delivering to a plan participant a summary plan description that accurately describes the terms of the plan, including disclosure that the plan is self-funded or partially self-funded;

(h) subject to Subsection (2), divert to another purpose or use other than as designated funds paid by a client to the professional employer organization and designated for:

(i) compensation of a covered employee;

(ii) a benefit of a covered employee;

(iii) a payroll-related tax;

(iv) an unemployment insurance contribution;

(v) withholding of compensation for a covered employee;

(vi) a workers' compensation premium; or

(vii) another assessment paid by a professional employer organization to or on behalf of a covered employee under a professional employer agreement;

(i) provide a covered employee to a client under a provision, term, or condition that is not contained in a professional employer arrangement between the professional employer organization and client;

(j) engage in a willful, fraudulent, or deceitful act that:

(i) is by a professional employer organization, caused by a professional employer organization, or at a professional employer organization's direction; and

(ii) causes material injury to a client or covered employee;

(k) fail to comply with a federal law or state law, to the extent state law is not preempted by federal law, regarding an employee benefit offered to an employee; or

(l) willfully or recklessly violate this chapter or an order or rule issued by the commissioner under this chapter.

(2) If a client defaults on a professional employer agreement or otherwise fails to pay a professional employer organization, the professional employer organization is not in violation of this section if the professional employer organization allocates the deficient payment to the portions of an invoice.

Enacted by Chapter 318, 2008 General Session

**31A-40-402. Disciplinary action.**

(1) Notwithstanding Section 31A-2-308, in accordance with this section the commissioner may take action against a person if the commissioner finds that the person:

- (a) is violating or has violated Section 31A-40-401; or
- (b) (i) is a:
  - (A) professional employer organization licensed under this chapter; or
  - (B) controlling person of a professional employer organization licensed under this chapter; and
- (ii) is convicted of a crime that relates to:
  - (A) the operation of a professional employer organization;
  - (B) fraud or deceit; or
  - (C) the ability of the professional employer organization or a controlling person of the professional employer organization to operate a professional employer organization.

(2) After notice and an opportunity for a hearing in accordance with Title 63G, Chapter 4, Administrative Procedures Act, if the commissioner makes a finding described in Subsection (1), the commissioner may:

- (a) deny an application for a license;
- (b) revoke, restrict, or refuse to renew a license;
- (c) place a licensee on probation for the period and subject to conditions specified by the commissioner;
- (d) impose an administrative penalty in an amount not to exceed \$2,500 for each violation; or
- (e) issue a cease and desist order.

Enacted by Chapter 318, 2008 General Session